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No. 81-2397

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

VIRGINIA PRIDDY, *Petitioner*

v.

H. T. PRIDDY, *Respondent*

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Texas

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QUESTIONS PRESENTED

1. Whether the Trial Court's decision not to grant Petitioner an interest in Priddy-Taylor Investments, a partnership formed by Respondent more than seven years prior to the parties' marriage and whose market value had not increased during the parties' marriage, resulted in the Petitioner being denied due process of law or the equal protection of the laws.
2. Whether the just and right division of the estate of the parties by the Trial Court which was supported by ample evidence resulted in the Petitioner being denied due process of law or the equal protection of the laws.

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H. T. PRIDDY, *Respondent*.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Texas

Respondent respectfully prays that the writ of certiorari be denied, and that the just determinations of the State Courts stand.

STATUTORY PROVISION INVOLVED AND NOT STATED BY PETITIONER

Texas Family Code, Section 5.01:

"(a) A spouse's separate property consists of:

(1) the property owned or claimed by the spouse before marriage . . ."

STATEMENT OF THE CASE

This statement of the case as herein presented by Respondent, H. T. Priddy, is necessary to fairly present the facts to the Honorable Supreme Court of the United States.

This is a divorce and marital property division case. Trial was to a jury which found that Respondent owned certain property as his separate property, and that Priddy-Taylor Investments, a partnership between A. E. Taylor and Respondent, existed prior to the parties' marriage (Tr. 137, 143-149). The jury found that, as of trial, $331,172 of capital contributions made by Respondent to Priddy-Taylor Investments during the parties' marriage had not benefited the partnership (Tr. 151-152). The Trial Court entered a Judgment and Decree of Divorce dividing the property at issue and denying Petitioner's reimbursement claims (Pet. App. D). Petitioner appealed, and the Court of Appeals affirmed the Trial Court and overruled Petitioner's seventy-two (72) points of error (Pet. App. C). On February 24, 1982, the Texas Supreme Court dismissed Petitioner's Application for Writ of Error for Want of Jurisdiction (Pet. App. A-1).

Parties

Petitioner and Respondent were married on December 24, 1977 (R. 4). *Approximatley eighteen (18) months later, Respondent filed for divorce on June 8, 1979 (Tr. 2)*, based upon the grounds of insupportability and Petitioner counterpetitioned (Tr. 8). The parties stipulated to such insupportability (R. 614-615).

Respondent, a male, was sixty-three years old at the time of trial, and has no more than a seventh grade education (R. 7). He has worked continuously since the approximate age of twelve (12) (R. 7), but has no pension plan or guaranteed retirement income plan (R. 654).

Petitioner at the time of trial was thirty-six years old. During the parties' marriage Respondent supported both Petitioner and her son by a prior marriage (R. 515). Petitioner is a high school graduate and has also completed a year of law school in Mexico (R. 519), Bernard Secretarial School (R. 519), a one-year art class (R. 520-521), and numerous English classes (R. 521, 522-524). Petitioner has worked as a secretary and as an art teacher (R. 525).

Petitioner did not work from the time of the parties' marriage up until the date of the trial (R. 518). She attended school throughout the parties' marriage (R. 581), with such schooling being paid for by Respondent (R. 34) and including courses in reading and English grammar at Tarrant County Junior College (R. 522-523), courses in grammar, typing, shorthand, spelling, filing and accounting at the Fort Worth School of Business (R. 523), English courses at the Berlitz School of Languages (R. 524), and business courses at the Hardwick School of Business (R. 524).

At the time of trial, Petitioner made numerous allegations to the jury concerning the alleged misdeeds of Respondent (R. 586-593), and Respondent stated that the allegations were false (R. 645-646). Petitioner's alleged cause of action for fraud concerning Petitioner's quitting her secretarial job (R. 528) has been severed

from this case (Tr. 85-86; Supp. Tr. 22). Petitioner's allegations concerning fraud were contradicted (R. 33).

Property

Respondent, in his sixty years prior to his marriage to Petitioner, accumulated interests in several corporations and partnerships, including Taylor Made Fats, Inc., LCW Trucking, Inc., LCW Truck Line, Inc., and Priddy-Taylor Investments (R. 19-20). For brevity, the properties of the parties will not all be discussed in detail, but it should be noted that the Judgment and Decree of Divorce (Pet. App. D) was a culmination of a jury trial beginning October 2, 1980 and ending October 21, 1980 (R. 1-803; Tr. 163), involving lengthy testimony from the parties and accountants, and submission of over 110 exhibits concerning the financial condition of the various entities including Priddy-Taylor Investments (PX 43-45, 47-49).

Based upon the evidence, in the opinion of Ronald Coulson, C.P.A., the fair market value of Taylor Made Fats, Inc. decreased during the parties' marriage (R. 472), and the fair market value of LCW Trucking, Inc. and LCW Truck Line, Inc., inactive businesses, did not increase during the parties' marriage (R. 354-355, 472-475).

Priddy-Taylor Investments, a partnership created on May 5, 1970 (PX 42; R. 251), has always been a 50/50 partnership between Respondent and A. E. Taylor, Jr. (R. 228). Priddy-Taylor Investments had losses totalling $215,000 in 1977, $147,000 in 1978, and $208,000 in 1979 (R. 436-439; PX 48). Ronald Coulson, C.P.A., testified

that the partnership equity of Priddy-Taylor Investments had a real decrease of $41,021 during the parties' marriage (PX 59; R. 467-468), and that the fair market value of Priddy-Taylor Investments did not increase during the parties' marriage (R. 477). The jury found that during the parties' marriage $331,172 was made as a capital contribution to Priddy-Taylor Investments by Respondent (Tr. 151), and that at the time of trial, the benefit of such capital contribution had been lost (Tr. 152-Issue 12).

Respondent under the terms of the Judgment and Decree of Divorce is expressly obligated to pay $144,404.41 in debts originating prior to the parties' marriage (Tr. 8; R. 59-61, 118-119, 254-261, 297, 332-333), and this liability figure does not take into consideration approximately $190,227 in current liabilities of Priddy-Taylor Investments stated in the balance sheet of December 31, 1979 (PX 54). When the gross community debt is added to the separate liabilities of Respondent, Respondent is required to satisfy $286,403.41 in liabilities. In contrast, Petitioner was only required to pay those debts incurred by her after the parties' separation (R. 174; Tr. 174).

SUMMARY OF ARGUMENT

The just and right division of the properties of the parties properly included the granting to Respondent of a 50% interest in Priddy-Taylor Investments which had been owned by Respondent since seven years prior to the parties' marriage and which did not increase in value during such marriage.

ARGUMENT

Respondent asserts that the decisions of the Texas Courts involved in this case were correct in all respects. However, in response to the Petition for Writ of Certiorari at issue, it should be noted that ". . . [a] review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. . ." S. Ct. Rule 17.1. A merely erroneous decision given by a State Court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *American Ry. Express Co. v. Commonwealth of Kentucky*, 47 S. Ct. 353, 355, 273 U.S. 269, 273, 71 L. Ed. 639, 641 (1927). The opinions of this Court suggest that the sole basis for disregarding an independent state substantive ground as inadequate is that it represents an effort to evade the command of federal law. Wright, Charles A., *Federal Practice and Procedures: Jurisdiction* §4029 (1977) citing *Demorest v. City Bank Farms Trust Co.*, 64 S. Ct. 384, 388, 321 U.S. 36, 42-43, 88 L. Ed. 526, 530 (1944). As indicated by the ensuing text, the divison of the estate of the parties in a divorce proceeding is the role of the State, and the division at instance is fully supported by Texas precedent, and resulted in a "just and right" division of the estate of the parties.

I. The Partnership as Separate Property

Petitioner complains of the awarding of a 50% undivided interest in the Texas partnership of Priddy-Taylor Investments to Respondent. The Texas Legislature recognizes that a spouse's separate property consists of

". . . the property owned or claimed by the spouse before marriage." TEX. FAMILY CODE ANN. 5.01(a) (1) (1975). Priddy-Taylor Investments is by the undisputed evidence produced at trial, a partnership of which Respondent has had a 50% interest since 1970 (PX 42; R. 228). Therefore, Respondent's 50% interest in Priddy-Taylor Investments was entitled to be classified as separate property. His undisputed inception of title in Priddy-Taylor Investments prior to marriage is the determining factor. Cf. *Dakan v. Dakan*, 83 S.W.2d 620, 627 (Tex. 1935).

The Texas Supreme Court has recognized that an interest in a partnership acquired prior to marriage by one spouse retains its separate nature during the marriage. *Norris v. Vaughan*, 260 S.W.2d 676, 681 (Tex. 1953). This recognition of the separate property characteristic of the partnership interest acquired prior to marriage conforms with the entity theory adopted by the Texas Uniform Partnership Act. TEX. REV. CIV. STATS. ANN. ART. 6132(b) *et seq* (1970), Art. 6132(b) §1, §25 (1970), Source and Comments — Alan R. Bromberg, pp. 300, 358.

A principal method of rebutting the presumption that all property acquired during marriage is community is a showing that the property was acquired prior to marriage. McKnight, Joseph W., *Family Law: Husband and Wife*, 35 SWLJ 93, 103 (1981). Since the partnership entity, Priddy-Taylor Investments, has been shown as an item of property owned prior to the marriage, a problem of tracing does not arise. See *Smoot v. Smoot*, 568 S.W.2d 177, 181 (Tex. Civ. App. — Dallas 1978, no writ).

The question before the Texas Courts was the manner in which to handle the capital contributions paid to Priddy-Taylor Investments to improve that partnership during the parties' marriage. The proper means of handling payments by the community estate to Priddy-Taylor Investments was for Petitioner to request reimbursement to the community estate from Respondent's separate property interest in Priddy-Taylor Investments; a request made in Petitioner's pleadings (Tr. 55).

Where community funds are expended for the improvement of a spouse's separate property, the measure of recovery is either the amount of the enhancement of the value of the separate property by virtue of the improvements determined at the time of partition, or the amount of community funds expended for the improvements, whichever is the lesser. *Texas Family Law, Fifth Edition*, Loy M. Simpkins, Section 22:38, page 504. As stated by the Fort Worth Court of Civil Appeals in *Davis v. Davis*, 108 S.W.2d 681, 687 (Tex. Civ. App. — Fort Worth 1937, no writ) ". . . [R]egardless of the amount of the advancement which is traced into the improvements of the *specific* property, the amount to be allowed upon partition is still further limited to the amount of enhancement in value of the improved property, due to the advances, *which still exist at the time of the partition.*"

Petitioner failed to establish a right of reimbursement. Priddy-Taylor Investments lost a total of $335,000 in 1978 through 1979 (PX 48; R. 436-440). LCW Trucking, Inc., a non-operating corporation, owes Priddy-Taylor Investments in excess of $250,000 which it cannot repay (R. 130-131, 354, 383-385). The real book value of Priddy-Taylor Investments has decreased since December 31,

1977 (PX 59; R. 467-469). The fair market value of Priddy-Taylor Investments did not increase during the parties' marriage (R. 476-477). The jury was certainly justified in finding at the time of trial that Petitioner failed to prove that Priddy-Taylor Investments was benefited or improved by the capital contributions during the parties' marriage (Tr. 152-Issue 12).

The Texas Supreme Court in denying Petitioner's Application for Writ of Error for Want of Jurisdiction (Pet. App. A-2), correctly recognized that the lower court opinion in this case (Pet. App. C) is not in material conflict with *Cox v. Cox*, 439 S.W.2d 862 (Tex. Civ. App. — San Antonio 1969, no writ), nor *Smoot v. Smoot*, 568 S.W.2d 177 (Tex. Civ. App. — Dallas 1978, no writ). Article 1728 Tex. Rev. Civ. Stats. Ann. (1964).

In order for there to be a conflict which would give rise to appellate jurisdiction in the Texas Supreme Court, the conflict must be such that one decision would operate to overrule the other in case both were decided by the same court. *John Farrell Lumber Co. v. Wood*, 400 S.W.2d 307, 308 (Tex. 1966). The case presently before the court is certainly not the same state of facts as appeared in *Cox v. Cox, supra. Cox* dealt with a finding by a trial court that the Cox partnership was totally separate property when the spouse claiming the partnership as separate property did not even submit pleadings in support of the contention that separate property existed. Respondent, H. T. Priddy, filed and submitted pleadings in support of his assertions of the existence of separate property (Tr. 2, 5; supp. Tr. 14). Furthermore, *Cox* did not involve a partnership which was created more than seven years before the parties' marriage. In this case, unlike *Cox*,

Respondent established the decline in the value of Priddy-Taylor Investments during the parties' marriage (e.g., PX 48, 59; R. 436-440; PX 46; R. 383-385, 437-438, 467-469; 476-477).

Likewise, it should be noted that *Smoot v. Smoot*, 568 S.W.2d 177 (Tex. Civ. App. — Dallas 1978, no writ) is a case wherein the principal asset listed as separate property of the Appellee was an undivided one-half interest in land which was given to the Appellee as his separate property and placed in the Smoot & Son partnership. Smoot & Son was completely capitalized by gifts to Appellee, without community contribution, and at the time of trial the principal asset of such partnership was the land donated to the partnership as a gift to the Appellee. *Smoot v. Smoot, supra*, at 179. The Dallas Court of Civil Appeals merely affirmed the Trial Court's holding that the Appellee's interest in Smoot & Son was his separate property to the extent of the value of the land which was placed in the partnership as a gift to him, and which remained in the partnership. *Smoot v. Smoot, supra*, at 181. Neither the *Smoot* facts nor the *Cox* facts are the "same state of facts" as exist in this case, and consequently, jurisdiction in the Texas Supreme Court was not invoked. *John Farrell Lumber Co. v. Wood*, 400 S.W.2d 307, 308 (Tex. 1966).

II. The Ultimate Determination: The Division of the estate was just and right.

As stated in the TEXAS FAMILY CODE §3.63 (1975), "In a decree of divorce or annulment, the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the

rights of each party . . ." Since the issue on appeal is the manner in which the property owned by the parties was divided, the judgment of the trial court will be reversed only when there is a clear abuse of discretion. *Bell v. Bell*, 513 S.W.2d 20, 22 (Tex. 1974). "The fact that a trial judge may exercise his discretional authority in a matter differently than an appellate judge would have done under similar circumstances, does not demonstrate that an abuse of discretion has occurred." *Musslewhite v. Musslewhite*, 555 S.W.2d 894, 897 (Tex. Civ. App. — Tyler 1977, writ dism'd).

The division of the property in this case was a "just and right" division giving due regard for the rights of each party. Neither the fair market value of Taylor Made Fats, Inc., LCW Trucking, Inc., LCW Truck Lines, Inc., nor Priddy-Taylor Investments increased during the parties' marriage (R. 471-477). The net book value of the assets of Respondent decreased by $124,377 from December 31, 1977 to December 31, 1979 (R. 464-465).

As stated, the Trial Court correctly classified Priddy-Taylor Investments as the separate property of Respondent. The fact that certain property may have been mischaracterized does not alter the fact that division of the property must be presumed "just and right," unless otherwise established by the Petitioner. Petitioner has failed to satisfy this burden. Consequently, any conflicts which might exist between the opinion of the Court of Appeals in this case and the opinions in *Cox v. Cox*, *supra*, and *Smoot v. Smoot*, *supra*, are inconsequential, and are not, upon a question of law "material to a decision in this case." Therefore, the Texas Supreme Court had no jurisdiction of the case, and it was unnecessary to

decide whether the asserted conflict actually existed. *Williams v. Williams*, 325 S.W.2d 682, 684 (Tex. 1959). In order for the Texas Supreme Court to have jurisdiction on the basis of conflicting decisions, the conflict must be upon a "question of law material to the decision of the case." In order to be material to a decision of the case, the question of law must be such that "a decision thereof will . . . necessarily control the disposition of the case." *Id.*

The bottom line in this case is that Petitioner is better able to make a living today than she was at the time she was married as the result of extensive education provided by Respondent. The business entities owned by Respondent prior to his marriage are worth no more today than they were at the time of the parties' marriage. Any income enjoyed by the parties during the parties' marriage arose from the efforts of Respondent in conjunction with business enterprises begun by Respondent prior to his marriage. Respondent has been required to discharge $286,403.41 in debts ($141,999 of which represents community debts), as well as his 1980 income tax liability, and partnership liabilities, while Petitioner is only obligated to pay debts incurred by her since the parties' separation (Pet. App. D).

In short, the decisions of the Texas Courts at issue were not erroneous, and even if erroneous did not deny Petitioner of equal protection of the laws nor of property without due process of law. Most certainly, if any error did exist, it did not constitute an effort to evade the command of federal law. See *American Ry. Express Co. v. Commonwealth of Kentucky*, 47 S. Ct. 353, 355, 273 U.S. 269, 273, 71 L. Ed. 639, 641 (1927) and *Demorest v.*

City Bank Farmers Trust Co., 64 S. Ct. 384, 388, 321 U.S. 36, 42-43, 88 L. Ed. 526, 530 (1944).

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted

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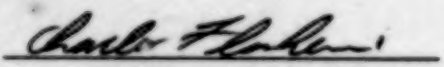
By: 

Charles Florsheim

Attorneys for Respondent,
H. T. Priddy.

CERTIFICATE OF SERVICE

I, Charles Florsheim, a member of the United States Supreme Court Bar, do hereby certify that on the 22nd day of July, 1982, three copies of the Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Texas in this cause was served upon Petitioner in accordance with the rules of this United States Supreme Court by depositing same in a sealed envelope, postage prepaid, certified mail, return receipt requested, addressed to Edwin Tobolowsky, Esq., Tobolowsky & Schlinger, P.C., 1900 Southland Center, Dallas, Texas, 75201, counsel of record for Petitioner, Virginia Priddy. I further certify that all parties required to be served have been served.

Charles Florsheim